Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

MARK B. RASMUSSON, et al.,

Petitioners,

vs.

LAWRENCE E. FROST, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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ISSUES PRESENTED

Issue No. One	Petitioners failed to raise any cause of action against Respondent Aero Freight, Inc.
Issue No. Two	Petitioners claims against Respondents Gail Beach and Chris Hines are barred by the applicable statute of limitations.
Issue No. Three	Respondents Gail Beach and Chris Hines are immune from civil liability under 19 U.S.C. § 507(b).

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TABLE OF CONTENTS

Page

ISSUES PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS v

TABLE OF AUTHORITIES vi

CASE HISTORY 1

STATEMENT OF THE CASE 2

1. Petitioners failed to raise any cause of action against Respondent Aero Freight, Inc. 3

2. Petitioners' claims against Respondents, Gail Beach and Chris Hines are barred by the applicable statute of limitations 4

3. Respondents, Gail Beach and Chris Hines are immune from civil liability under 19 U.S.C. § 507(b) 7

REASONS FOR DENYING THE WRIT 7

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Jackson v. Johnson, 950 F.2d 263 (5th Cir. 1992)..... 5

Owens v. Okure, 488 U.S. 235, 109 S. Ct. 573, 102 L. Ed. 2d 594 (1989)..... 5

Turner v. Upton County, Texas, 967 F.2d 181 (5th Cir. 1992, reh. den.)..... 6

FEDERAL STATUTES CITED

19 U.S.C. § 507(b)..... 7, 10, 11

28 U.S.C. § 1254..... 11

28 U.S.C. § 1257..... 11

42 U.S.C. § 1983..... 1, 5, 6

TEXAS RULES CITED

TEX. CIV. PRAC. & REM. CODE § 16.002.....5, 10

TEX. CIV. PRAC. & REM. CODE § 16.003..... 5

CASE HISTORY

The Petitioners' original complaint was filed with the District Court for the Western District of Texas on November 21, 1995 alleging civil rights and implied state tort violations against various law enforcement agencies, their agents, and Respondents, AERO FREIGHT, INC., GAIL BEACH and CHRIS HINES. (Petitioners' Third Amended Original Petition, Appendix B). Petitioners' attempt to allege causes of action against Respondents, BEACH and HINES for slander, civil conspiracy, simple and gross negligence, tortuous interference with business relations, and violations of 42 U.S.C. § 1983. These allegations are based on alleged statements BEACH and HINES gave to law enforcement authorities. (Petitioners' Recorded Excerpts, Appendix E). After sufficient opportunity for discovery and after Petitioners had amended their complaint twice, all defendants filed motions for summary judgment. These motions were granted. On May 27, 1997, the District Court issued a final order, and later denied all motions for reconsideration and new trial. (Petitioners' Appendix A, pp. 1-2; memorandum opinion and order pp. 3-93; Petitioners' Record Excerpts, Appendix E).

Petitioners filed an appeal of the District Courts decision in the United States Court of Appeals for the Fifth Circuit. In a two paragraph opinion, rendered on November 9, 1998, the Court of Appeals stated that Petitioners were merely complaining of being the targets of a criminal investigation. The Court of Appeals made reference to the District Court's Memorandum Opinion and Order as a comprehensive and convincing rationale for determining that Petitioners failed to state a claim, their claims

were barred by limitations and concluded that Petitioners were entitled to no relief. (Petitioners' Court Orders, Appendix A. p. 2). The Court of Appeals agreed with the District Court's decision to grant summary judgment in favor of Respondents, AERO FREIGHT, INC., BEACH and HINES.

Petitioners now seek a Writ of Certiorari from the United States Supreme Court. Allegations against Respondents, BEACH and HINES can only dimly be deduced from Petitioners' "Statement of the Case". Petitioners' claim that rumors and/or false information was knowingly and intentionally relayed from Respondents, BEACH and HINES to law enforcement officials for the purpose of causing Petitioners harm. There are no allegations of wrongdoing against AERO FREIGHT, INC. in Petitioners' reasons for granting the writ. (Petition for Writ of Certiorari, p. 12). Petitioners' Reason Number III for granting the writ makes reference to this pertinent allegation, but limits the scope as applying only to "Respondents-Subordinates". (Petition for Writ of Certiorari, p. 27).

STATEMENT OF THE CASE

The petition seeks review of the Fifth Circuit's opinion approving summary judgment as to Respondents, AERO FREIGHT, INC., BEACH and HINES. Petitioners' contention that the Fifth Circuit decided important federal questions in a way that conflicts with relevant decisions of this Court is flatly wrong.

As detailed below, there is no cause for the Court to review Petitioners' factbound argument, which has now been rejected by the District Court and by Per Curiam Opinion of the Fifth Circuit Court of Appeals. The Fifth Circuit Court of Appeals agreed with the District Court's categorization that the complaint in this action reads like a script for an Oliver Stone movie rather than a suit for civil damages. (Petitioners' Appendix A, p. 2). More importantly, the Court of Appeals found that Petitioners were not entitled to relief because, among other reasons, they failed to state a claim against AERO FREIGHT, INC.; their claims against Respondents, BEACH and HINES were barred by limitations, and Respondents, BEACH and HINES were entitled to summary judgment based on immunity.

Issue No. One

Petitioners failed to raise any cause of action against Respondent AERO FREIGHT, INC.

The District Court clearly found that Petitioners failed to assert any claims whatsoever against AERO FREIGHT, INC. (Petitioners' Record Excerpts, Appendix E). Neither did Petitioners allege that the conduct of Respondents, BEACH and HINES was done in the course and scope of employment with AERO FREIGHT, INC. Summary judgment was granted on behalf of AERO FREIGHT, INC. for the simple reason that Petitioners failed to state any cause of action against it, or even allege any facts to support a cause of action. Moreover, Petitioners failed to raise any issues or claims in this appeal as to AERO FREIGHT, INC. Therefore, there are

no genuine issues for trial as to AERO FREIGHT, INC. and Petitioners' claims against AERO FREIGHT, INC. fail as a matter of law.

Issue No. Two

Petitioners' claims against Respondents, Gail Beach and Chris Hines are barred by the two year statute of limitations.

Simply stated, Respondents, BEACH and HINES, argued for summary judgment based on limitations and the District Court and the Fifth Circuit Court of Appeals agreed. (Petitioners' Record Excerpts, Appendix E). Petitioners in this appeal have failed to raise or address the issue of limitations.

Petitioners' 30-page Petition for Writ of Certiorari to the United States Supreme Court mentions Respondents, BEACH and HINES only briefly in recounting the facts, but then completely fails to implicate Respondents, BEACH and HINES in their questions for review. Petitioners' Question III argues that the President of the United States cannot avoid liability for lying about his most personal and intimate life, hence "respondents-subordinates" should not be permitted to lie either. (Petition for Writ of Certiorari, p. 27). Without directly addressing the merits of Petitioners' arguments concerning the President, it should be noted that Petitioners limit their complaint to alleged lying on the part of unidentified "respondents-subordinates". Respondents, BEACH and HINES are not, nor have they ever been referred to as subordinates of any of the named respondents.

Although not entirely clear from reviewing the petition for Writ of Certiorari, Respondents, BEACH and HINES assume that Petitioners are attempting to allege causes of action for slander, civil conspiracy, simple and gross negligence, tortuous interference with business relations and violations of 42 U.S.C. § 1983 based on statements given to law enforcement authorities. There is no federal limitations for actions brought under 42 U.S.C. § 1983. Instead, state statutes governing limitations on alleged tortuous acts sets the applicable limitations period. *Owens v. Okure*, 488 U.S. 235, 249-50, 109 S.Ct. 573, 582, 102 L. Ed. 2d 594 (1989); *Jackson v. Johnson*, 950 F.2d 263, 265 (5th Cir. 1992). The statute of limitations for a slander cause of action, as prescribed by Texas law, is one year. *Texas Civil Practices & Remedies Code § 16.002.* The statute of limitations for all other causes of action, as proscribed by Texas law, is two years. *Texas Civil Practices & Remedies Code § 16.003.*

Petitioners filed their Original Complaint on November 21, 1995. (Petitioners' Record Excerpts, Appendix E). It is undisputed that law enforcement authorities spoke with BEACH and HINES for the last time in September of 1993. (Petitioners' Record Excerpts, Appendix E). Petitioners have pled no facts, nor discovered any evidence showing otherwise. Petitioners clearly filed their lawsuit after the limitations period.

A reading of Petitioners' entire petition reveals Petitioners' hopes and aspirations that the continuation of actionable conduct within the limitations period by Conspirator A, somehow ensnares Conspirator B, whose actionable conduct lies entirely outside the limitations period. Unable to identify any conduct on the part of

BEACH and HINES within the limitations period, Petitioners are thus left to cling to their "continuation" theory. This is not the law in the Fifth Circuit.

In *Turner v. Upton County, Texas*, a case with strictly similar facts, Plaintiff Turner brought a § 1983 action against Upton County, its former sheriff, the district attorney, and a private individual for conspiring to deprive her of her civil rights. In essence, she alleged that the sheriff paid an informant to plant drugs at Turner's business premises, and that the sheriff and informant later conspired, along with the district attorney, to force Ms. Turner to stand trial on a trumped-up charge. Like Rasmusson, Turner was tried and eventually acquitted.

Turner then filed civil suit against those who testified against her in the criminal trial. Turner's suit, which was based on 42 U.S.C. § 1983, alleged that named defendants violated Turner's due process rights. In finding that Turner's claims were barred by limitations, the Fifth Circuit Court of Appeals held that liability could be imposed only if there was sufficient evidence of an overt act in furtherance of the conspiracy committed within the statute of limitations. Again, like Rasmusson, Turner was unable to present admissible evidence to this effect. *Turner v. Upton County, Texas*, 967 F.2d 181 (5th Cir. 1992, reh. den.).

Issue No. Three

Respondents, Gail Beach and Chris Hines are immune from civil liability under 19 U.S.C. § 507(b).

19 U.S.C. Sec. 507(b) holds in pertinent part that:

> Any person other than an officer or employee of the United States who renders assistance in good faith upon the request of a customs officer shall not be held liable for any civil damages as a result of the rendering of such assistance if the assisting person acts as an ordinary, reasonably, prudent person would have acted under the same or similar circumstances.

To the extent BEACH and HINES provided any information to agents of the United States Customs Service, about which Petitioners complained, such conduct is immune from suit. Petitioners have offered not one shred of evidence that BEACH or HINES failed to act in good faith during interviews with Customs Agents. Moreover, Petitioners on appeal have failed to address the issue of immunity under 19 U.S.C. § 507 and thus have waived any complaint.

REASONS FOR DENYING THE WRIT

1. Plaintiffs have named AERO FREIGHT, INC. as a party Defendant in its original petition to the suit, but failed to allege any causes of action against it. Accordingly, AERO FREIGHT, INC. was dismissed from the case by the District Court on grounds that no claims have been asserted against it. The Fifth Circuit Court of Appeals upheld that decision. The decisions below were plainly

correct applications of law. In Petitioners' petition for Writ for Certiorari, there are no allegations to the contrary against AERO FREIGHT, INC. and thus, Petitioners' claims against AERO FREIGHT, INC. are meritless.

2. According to Petitioners' last filed complaint, Respondents, BEACH and HINES provided false information to law enforcement officers in order to "do in" their competitor, Rasmark. Petitioners' complaint reads:

> On March 9, 1993, Defendants Frost and Mills . . . conducted an interview with Gail Beech (sic), owner of Aero Freight of El Paso, a direct competitor, and former business associate, of Rasmark. Majority, if not all, of the information that Gail Beach told to Frost and Mills were based on rumors and disinformation that she had heard, mainly from former, disgruntled employees. Beach told the agents that her information was based largely on rumors. (Petitioners' Third Amended Original Petition, Appendix B, Petitioners' Court Orders, Appendix A, p. 76).

Petitioners complain that Respondent Frost then used the information given him by Respondent Beach in an affidavit supporting his request for a search warrant on November 19, 1993. Agents also met with Respondent Hines on March 16, 1993 and Petitioners allege that Respondent Hines engaged in misinformation and rumor mongering, and that his statements also made their way into Agent Frost's November 19, 1993 affidavits. Both Respondents, BEACH and HINES offered sworn affidavits stating they met with agents only one time each, on March 9 and March 16, 1993 respectively. BEACH and HINES swore that at all times they responded truthfully

to the questions posed and provided information in good faith. Customs Agents Schroeder and Frost, Respondents in this lawsuit, have corroborated BEACH and HINES' affirmations. Agent Schroeder, who interviewed Respondent Hines on March 16, 1993, stated that he called Hines five to six times after the interview to clarify details previously discussed, but that no contact with Hines was made after July 1993. Likewise, Agent Frost, who interviewed Respondent Beach, indicated that other than a few post-interview calls to clarify details of their conversation, no contact with Beach was made after September 1993. Plaintiffs' complaint was filed on November 21, 1995, more than two years after the absolute last contact agents had with Respondents BEACH and HINES.

For limitations purposes, the question becomes when Plaintiffs knew or should have known of the complained of acts. This question is answered by Mark Rasmusson himself. In his affidavit, Mr. Rasmusson states, in several places, that he was aware that Respondent BEACH was furnishing false, misleading and slanderous information to Customs agents. Paragraph 23 of Mr. Rasmusson's affidavit reads:

> My employees and my business competitors were interviewed. One competitor, Gail Beech (sic), owner of Aero Freight, used these interviews to furnish false, misleading, and slanderous information about me and Rasmark to USCS and later to officials of Ford Motor Co., one of my major customers.

Mr. Rasmusson makes similar allegations in paragraphs 10, 27, 39. (Petitioners' Affidavit Excerpts, Appendix C,

pp. 262-63). The District Court found, and the Fifth Circuit Court of Appeals affirmed that the chronology of the paragraphs in his affidavit leads to the conclusion that Mark Rasmusson knew as early as 1989 that Gail Beach was making allegedly slanderous statements to Customs agents concerning Rasmark. The record before this Court is devoid of any evidence to the contrary. If Petitioners seek to hold Respondents, BEACH and HINES liable for defamation, their claim is time barred. TEX. CIV. PRAC. & REM. CODE § 16.002.

3. If Plaintiffs seek to hold BEACH and HINES liable for providing information to Customs agents in the course of an investigation, the two are immune from civil liability for their actions under 19 U.S.C. § 507(b). That section reads, in part:

> Any person other than an officer or employee of the United States who renders assistance in good faith upon the request of a customs officer shall not be held liable for any civil damages as a result of rendering such assistance if the assisting person acts as an ordinary, reasonably prudent person would have acted under the same or similar circumstances.

Both Respondents, BEACH and HINES have sworn that they responded to the inquiries truthfully and provided information in good faith. Plaintiffs' uncorroborated allegations that BEACH and HINES engaged in misinformation, without more, is certainly not enough to defeat Respondents' affirmations that they acted as ordinary, reasonably prudent individuals. Thus, notwithstanding the fact that Plaintiffs' claims against BEACH and HINES

fail on limitations grounds, BEACH and HINES are likewise immune from civil liability under 19 U.S.C. § 507(b).

The Petitioners are thus challenging settled law and sound policy, and their effort to do so does not call for this Court's review.

CONCLUSION

A Review of a Writ of Certiorari is an extraordinary remedy that is available only in limited circumstances and is appropriate only when there are special and important reasons therefor. 28 U.S.C. §§ 1254, 1257. Additionally, a review on writ of certiorari is not a matter of right, but of judicial discretion. *Id.* Petitioners have failed to state causes of action against Respondents, AERO FREIGHT, INC., BEACH and HINES at the District Court, at the Fifth Circuit Court of Appeals, and now, again, before this Court. Their allegations at each and every level have been vague and conclusory. For the reasons

given above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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